DOCUMENT RESUME

ED 348 728 EA 024 172

AUTHOR Addonizio, Michael
TITLE Recent Developments in School Finance Litigation: Some Observations on Causes and Implications. Policy Report PR-B11.
INSTITUTION Indiana Univ., Bloomington. Education Policy Center.
SPONS AGENCY Lilly Endowment, Inc., Indianapolis, Ind.
REPORT NO PR-B11
PUB DATE 92
NOTE 24p.
AVAILABLE FROM Indiana Education Policy Center, Smith Center for Research in Education, Suite 170, Indiana University, Bloomington, IN 47405 ($7.50).
PUB TYPE Viewpoints (Opinion/Position Papers, Essays, etc.) (120) -- Reports - Descriptive (141)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Court Litigation; *Educational Equity (Finance); *Educational Finance; Elementary Secondary Education; *Equal Protection; *Finance Reform; Resource Allocation; State Aid; *State Courts

ABSTRACT

Recent developments in school finance litigation are described in this document, which examines the legal bases for school finance challenges and the nature of the inequities that plaintiffs seek to prove. The first section summarizes the legal theories upon which the challenges have been based. Section 2 focuses upon plaintiffs' arguments in the most recent round of litigation that occurred in New Jersey, Texas, Kentucky, and Montana, and the fiscal conditions that facilitated them. The third section summarizes the current status of school finance case law and offers some observations regarding possible legislative responses to recent judicial rulings. The review points to a problematic degree of variation in judicial findings that exist across states in similar fiscal situations; a lack of a basic sense of fairness; and the failure of the political system to achieve consensus on questions of equity, adequacy, and efficiency. These conclusions call into question the fairness of the state school finance system in distributing educational resources. (37 references) (LMI)

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# Recent Developments in School Finance Litigation: Some Observations on Causes and Implications

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# Recent Developments in School Finance Litigation: Some Observations on Causes and Implications

by Michael Addonizio

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# RECENT DEVELOPMENTS IN SCHOOL FINANCE LITIGATION: SOME OBSERVATIONS ON CAUSES AND IMPLICATIONS

Since January 1989, the supreme courts of Montana, Kentucky, Texas, and New Jersey have struck down their states' school financing systems, citing unconstitutional disparities in district spending due to differences in local taxable property wealth. Further, at the time of this writing, school finance litigation is pending in 13 other states and is being actively considered in 4 others.[1]

This report examines the legal bases for school finance challenges and the nature of the inequities that plaintiffs seek to prove. Section I summarizes the legal theories upon which challenges have been based. Section II focuses upon plaintiffs' arguments in the most recent round of litigation and the fiscal conditions that gave rise to them. The report concludes with a summary of the current state of school finance case law and some observations regarding possible legislative responses to recent judicial rulings.

## I. School Finance Challenges in State and Federal Courts[2]

Among the states' sovereign powers is the authority to provide for education. Every state constitution assigns responsibility to its legislature for providing a system of free public schools. Unlike the U.S. Congress, which has only those powers enumerated in the U.S. Constitution, state legislatures retain all powers not expressly forbidden by state or federal constitutional provisions. Because education clauses in state constitutions are usually worded in general terms, state legislatures have considerable discretion in passing legislation governing schools, including how school funds will be raised and distributed.[3]

This discretion, however, is not complete. A state's latitude in fashioning and financing its education system is constrained by fundamental public rights guaranteed all individuals by the U.S. Constitution. Specifically, state school finance systems cannot interfere with

[1] Cases are active in Alabama, Alaska, Connecticut, Idaho, Indiana, Kansas, Massachusetts, Minnesota, Missouri, North Dakota, Oregon, Tennessee, and Virginia and are being contemplated in Illinois, Michigan, Nebraska, and Oklahoma.

[2] This brief summary of the legal framework for school finance litigation follows Webb, McCarthy, and Thomas, 1988.

[3] Despite the widely held misconception that local school boards control public education in the United States, local boards have only those powers conferred by the state. School buildings are considered state property, and school revenues are state monies, regardless of where they are collected.

the Fourteenth Amendment's guarantee of equal protection of the laws. Legal challenges to state school finance systems have often focused on equal protection guarantees in the U.S. Constitution or in state constitutions. Further, state courts have applied the equal protection clause to the education clause of their constitutions. That is, state courts have viewed the language or intent of the education clause as establishing education as a fundamental right subject to equal protection guarantees. Finally, some state courts have bypassed equal protection arguments altogether, holding instead that the education clause establishes a constitutional guarantee that is not met by the existing educational system.

**Judicial Standards for Equal Protection Claims**

Several tests have been developed by the U.S. Supreme Court to evaluate equal protection challenges of state school finance systems. The most lenient of these tests is the *rational basis test*, which requires only that the challenged finance classifications be rationally related to a legitimate state goal in order to be upheld. Courts have applied this lenient standard in the absence of a finding of discrimination based either on *suspect classifications* (e.g., race, gender, national origin) or on the impairment of a *fundamental right* (i.e., a right expressly or implicitly guaranteed by the federal Constitution or by a state's constitution, such as marriage, procreation, and interstate travel). Of the 14 states where courts have applied this standard in school finance challenges, 13 state school finance systems were found constitutional.[4] The rationale used by the courts in upholding school finance systems has consisted generally of the following arguments:

1. The promotion and preservation of local control is a legitimate state interest;

2. "Equal protection" does not require that school resources be equal for all students;

3. The school finance deprivations alleged are relative, not absolute (i.e., "poor" districts are poor only in comparison with "wealthy" districts);

4. Courts should avoid intrusions on legislative prerogatives in areas of tax policy and education (see Sparkman, 1990).

A second and more stringent equal protection test, *strict scrutiny analysis*, is applied to legislative classifications that are based on suspect classifications or that impinge on a fundamental right. Under the strict scrutiny test, the legislation loses its presumption of validity, and the government "must demonstrate a compelling state interest that is promoted by the . . . classifications created under the [law]" (*Rodriguez v. San Antonio*, 1971, p. 283). Under this analysis, the state bears the burden of proving that a fiscally unequal system is constitutional because of a compelling state interest in maintaining such a system. In the eight school finance challenges in which courts have applied the strict scrutiny test, none of the finance systems was found to be supported by a compelling state interest. Consequently, all eight were ruled unconstitutional.

[4] The sole exception was the Supreme Court of Arkansas; see *Dupree v. Alma School District*, 1983.

Since the 1970s, the U.S. Supreme Court has expressed dissatisfaction with having to choose between the lenient rational basis test and the stringent strict scrutiny test in evaluating equal protection challenges to state legislation. Consequently, an intermediate scrutiny or *middle tier test* was fashioned for evaluating equal protection claims. To pass this test, the classification "must serve important government objectives" (*Craig v. Boren*, 1976, p. 197). The test was used by the Court in 1981 to invalidate a Texas law that effectively denied the children of illegal aliens a free public school education in that state (*Plyler v. Doe*, 1982).

### Challenges Under the Education Article

A state's constitutional duty to provide a system of free public education is expressed in the language of the education article of its constitution. Such language ranges from a mere mention of "free public education" to stronger edicts that public education should be "thorough and efficient," "uniform," "general and uniform," or should provide "equal educational opportunity" to all. The education article is generally invoked in school finance litigation either by direct application, as an expression of the state's constitutional duty, or by indirect application, through arguments that the article's language establishes education as a fundamental right with equal protection guarantees requiring strict scrutiny analysis.

**Direct application**. An example of direct application of the education article is *Robinson v. Cahill* (1973). In that case, the New Jersey Supreme Court found the state school finance system to violate the state constitution's education article, which requires the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools" (New Jersey Constitution, 1947). Construing the education article as a guarantee for all children of "that educational opportunity . . . needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market" (*Robinson v. Cahill*, 1973, p. 295), the court ruled that "the State must meet that obligation itself or if it chooses to enlist local government it must do so in terms which will fulfill that obligation" (p. 292). The court concluded that the constitutional guarantee had not been met because of the fiscal disparities across school districts.

Perhaps the best-known direct application of a state education article is *Pauley v. Kelly* (1979), in which the West Virginia Supreme Court considered the constitutional provision that "the Legislature shall provide, by general law, for a thorough and efficient system of free schools" (West Virginia Constitution, 1870). The court defined such a system as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation, and citizenship, and does so economically" (*Pauley v. Kelly*, 1979, p. 877). The high court remanded the case to the circuit court with orders to develop "thorough and efficient" education standards. The case is noteworthy for the detail of the standards thus developed, including requirements for curriculum, personnel, facilities, and equipment for all school programs, along with the resources needed to meet those standards. The circuit court found the existing system "woefully inadequate" by comparison and invalidated

both the state school finance system and state procedures regarding local property tax assessments.[5]

Decisions in other states, however, contrast with the New Jersey and West Virginia cases. For example, the Supreme Court of Illinois held that the education article did not impose any specific obligation on the legislature (*Blase v. State*, 1973). Similarly, while the Georgia Constitution states that "the provision of an adequate education . . . shall be a primary obligation of the State" (Georgia Constitution, 1976), the Georgia Supreme Court held that there were no "judicially manageable standards for determining whether or not pupils are being provided an adequate education," thus leaving the setting of such standards to the legislature (*McDaniel v. Thomas*, 1981, p. 165, quoting *Deriso v. Cooper*, 1980). As a final example, the Oregon Supreme Court concluded that the requirement of a "uniform and general system of Common schools" means only that "the state requires and provides for a minimum of educational opportunities in the district and permits the districts to exercise local control over what they desire, and can furnish, over the minimum" (*Olsen v. State*, 1976, p. 148). This interpretation allows considerable latitude for interdistrict disparities in tax rates and spending levels.

**Indirect application**. The education article has been applied indirectly in two ways. In one way, the plaintiff argues that the article establishes education as a fundamental right. On that basis, an equal protection claim is made requiring strict scrutiny analysis of the state school finance system. Alternatively, an equal protection claim is made based upon an implied guarantee in the education article of "equal educational opportunity." On the basis of this implied guarantee, plaintiffs argue that significant inequalities in the distribution of or access to resources violate the equal protection requirement.

Such claims raise the issue of the relationship between educational resources and educational opportunity while avoiding the more problematic issue of the relationship between resources and educational outcomes. Plaintiffs have argued that school expenditures are positively and significantly correlated with the ability to provide educational programs and services, that is, with educational opportunity. Whether school districts in fact allocate resources efficiently or make poor choices about their use of funds is dismissed as irrelevant, as in the difficult (and sometimes confusing) debate about whether school resources improve student learning (see Hanushek, 1989). Some courts have rejected plaintiffs' arguments that the concept of equal educational opportunity imposes a limit on inequality in the distribution of educational resources or that it requires a minimum level of funding for an "adequate" educational program. For example, the supreme courts of Idaho (*Thompson v. Engelking*, 1975), Oregon (*Olsen v. State*, 1976), and Colorado (*Lujan v. Colorado*, 1982) held that their states' respective education articles merely require the legislature to establish a system of public schools, not to assure equal per-pupil expenditures, equal programs, or a "high quality" program for all children. In rejecting strict distributional standards for the education article, these courts refrained from subjecting

[5] Despite this extraordinary judicial intervention in education reform, West Virginia continues to struggle with this landmark case. See *Pauley v. Gainer*, 1986.

their states' school finance systems to strict scrutiny analysis and upheld those systems against equal protection challenges by using the less stringent rational basis test.

In other states, however, plaintiffs have successfully challenged school finance systems by citing both distributional inequities and inadequacies in local education programs and have been able to convince courts to apply the strict scrutiny test. For example, in 1973 the New Jersey Supreme Court held that "educational opportunity does depend in substantial measure upon the number of dollars invested, notwithstanding that the impact upon students may be unequal because of other factors, natural or environmental" (*Robinson v. Cahill*, p. 277). The court then directed the state department of education to specify the content of the "thorough and efficient system of free public schools" mandated by the state constitution. Resource distribution was the focus of a 1982 New Jersey superior court ruling that a legislative formula to reduce state aid to property-rich and/or high-spending districts did not violate equal protection rights or the state education article's "thorough and efficient" requirement (*Board of Education of Township of Fairfield v. Kean*, 1982).[6]

The West Virginia Supreme Court in 1979 subjected the state's school finance plan to strict scrutiny analysis in response to an equal protection claim based on the "thorough and efficient" language in the state's education article. The court held that "equal protection, applied to education, must mean an equality in substantive educational offerings and results, no matter what the expenditure may be" (*Pauley v. Kelly*, 1979, p. 865). Further, the court held that each school must meet high quality statewide standards. Thus, the court ruled that local school programs must be both equal and adequate.

Finding a "direct relationship between per-pupil expenditures and the breadth and quality of educational programs,"[7] the Connecticut Supreme Court in *Horton I* accorded education the status of a fundamental right (*Horton v. Meskill*, 1977, p. 368). Applying the strict scrutiny test, the court ruled that the state school finance system, which relied heavily on local property taxes, failed to provide children equal exercise of that right. In response to this ruling, the Connecticut legislature adopted a guaranteed tax base (GTB) formula and several new categorical grant programs,[7] but a Connecticut superior court in 1984 ruled that the new system failed to provide children with equal educational opportunities. On appeal, however, the Connecticut Supreme Court ruled that in 1984 the lower court had applied the wrong test. Acknowledging that the court had found education a fundamental right in *Horton I*, the supreme court noted in *Horton II* that "the . . . nature of litigation involving school financing legislation militates against formalistic reliance on the usual standards of the law of equal protection, in particular against the requirement that the state must demonstrate a compelling state interest" (*Horton v. Meskill*,

[6] Under the challenged law, about 85 of New Jersey's 600 school districts lost all "minimum" state aid, that is, aid distributed to wealthy or high-spending districts outside of the equalizing formula.

[7] A GTB formula ensures that all school districts will generate the same amount of revenue per pupil for the same tax effort.

1985, p. 1105). The Connecticut Supreme Court instead borrowed a three-part test that the U.S. Supreme Court had used to assess the constitutionality of state legislative apportionment plans. Hence, a plaintiff must first show that disparities in educational expenditures are more than negligible in that they jeopardize the plaintiff's fundamental right to education. If this is shown, the burden then shifts to the state to justify these disparities as incident to the advancement of a legitimate state policy. Finally, if the state's justification is acceptable, the state must then further demonstrate that the disparities are not so great as to be unconstitutional. The court remanded the case so that the lower court could apply this test and determine if the amendments to the educational financing plan were unconstitutional.

Significantly, courts accepting the proposition that school expenditures are the primary determinant of education program quality have found states' school funding systems unconstitutional. In each case, the court has applied strict scrutiny analysis in examining the equal protection claims because education was deemed a fundamental right (Sparkman, 1990).

## II. Recent Developments

### New Jersey

In June 1990, the New Jersey Supreme Court ruled the state's school finance system "unconstitutional as applied to poorer urban school districts" (*Abbott v. Burke*, 1990, p. 359) and ordered the legislature to increase spending in its poorest urban districts to the level of wealthy suburban districts by the start of the 1991-92 school year.[8] The court rejected the state's argument that spending differences are not a major cause of unequal educational program quality, declaring that evidence "shows beyond doubt that money alone has not worked . . . [but] does not show that money makes no difference. . . . [T]he entire state aid program itself is based on the assumption that money makes a difference in the quality of education" (p. 404). Further, the court ruled that the new funding formula must not only equalize spending across urban and suburban districts but must also address the "special disadvantages" of urban students with additional state aid. Finally, the court also circumscribed local discretion in tax and spending decisions, ruling that "such funding cannot be allowed to depend on the ability of local districts to tax" but "must be guaranteed and mandated by the state" (p. 363).[9]

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[8] At the time of this ruling, New Jersey had the longest running state court challenge of the constitutionality of a public K-12 funding system, including 10 legal actions against the state's school finance system between 1971 and 1985 (and eight U.S. Supreme Court decisions); the New Jersey Supreme Court declared the system unconstitutional on at least three occasions.

[9] In limiting its remedy to the state's 28 property-poor urban districts, the high court implied that interdistrict disparities become unconstitutional once they exceed an unspecified threshold. In contrast, the lower court ruled more broadly on the state's aid distribution formula, declaring unconstitutional the state's minimum aid program, which provided aid to all districts, regardless of wealth.

## Texas

Fifteen years after the U.S. Supreme Court ruled in *Rodriguez* that the Texas school finance system did not violate the U.S. Constitution, the system's constitutionality was challenged in state court (*Edgewood Independent School District v. Kirby*, 1987). The plaintiffs argued that education is a fundamental right under the Texas Constitution, while the state, relying in part on the federal legal precedent of *Rodriguez*, argued that it cannot be construed as such.

The plaintiffs also sought to demonstrate that the finance system created a "suspect class" by discriminating against pupils, particularly Mexican-American pupils, in property-poor districts. The state countered with a three-pronged defense: (a) that the considerable disparities among districts in property wealth were substantially neutralized by the state's foundation school aid formula, (b) that district wealth was not significantly correlated with pupil performance, and (c) that any remaining inequities were not a constitutional issue.

In a preliminary ruling, the trial court held that education was a fundamental right under the Texas Constitution and that equal access to funds was an integral part of that right (*Edgewood v. Kirby*, 1987). The court's final decision held that the Texas school finance system, implemented in conjunction with local school districts of substantially unequal property wealth, was unconstitutional because it failed to ensure that each district would have the same ability to obtain funds (state or local) for education, including funds for facilities and equipment. The court held that the system denies children living in poor districts equal protection of the law, equality under the law, and the privileges and immunities guaranteed by the Texas Constitution. The court added that legitimate cost differences across districts and pupils should be, but are not required to be, considered in any new funding formula.

The Court of Appeals reversed the district court decision by a vote of two to one, ruling that education is not a fundamental right under the Texas Constitution and that, accordingly, the Texas school finance system should not be subject to strict scrutiny analysis requiring demonstration of a compelling interest to justify the system (*Kirby v. Edgewood*, 1988). The court majority held that the state needed only to demonstrate a "rational relationship" between the school finance system and a legitimate state purpose and that the state's system, with its reliance on the local property tax, was rationally related to "effectuating" local control of the public schools.[10]

The Texas Supreme Court unanimously reversed the appeals court decision and affirmed the trial court's decision with several modifications (*Edgewood v. Kirby*, 1989).

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[10] The dissenting judge argued emphatically that education is a fundamental right, recalling the statement of the U.S. Supreme Court in *Brown v. Board of Education* (1954) that "[i]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms" (p. 347). The dissent held that the state had failed to show a compelling interest in maintaining educational disparities across districts and that such a system of unequal access to educational resources could not be characterized as "efficient." See Walker and Thompson, 1989.

First, the court affirmed the trial court's holding that the finance system violated the efficiency requirement of the education article of the Texas Constitution,[11] but it avoided the equal protection analysis undertaken by the lower court. Citing an "implicit link between efficiency and equality" (p. 396), the court reasoned that an inequitable system is inherently inefficient. On the equal protection issue, the court held that since the finance system was already found unconstitutional on efficiency grounds, the court did not need to address other arguments.

Second, while the Texas Supreme Court affirmed the trial court's ruling that districts should enjoy equal access to funds for education, it held that school district revenues need only be "substantially equal" at equal tax rates, thereby softening the trial court ruling that districts must possess the same ability to raise revenue. This distinction is important because legislative remedies required to meet the trial court's standard of absolute fiscal neutrality are draconian, including school district reorganization, recapture of local property tax revenue in property-rich districts and distribution of these funds to property-poor districts, and/or a substantial increase in state school aid.

Third, the court's relaxation of the fiscal neutrality standard (i.e., the absence of a correlation between local property wealth and local education expenditures) appears to leave room for local supplementation of equalized revenue, an option precluded by the trial court's ruling. The high court's definition of "local enrichment" is ambiguous: "Nor does it mean that local communities would be precluded from supplementing an efficient system established by the legislature; however, any local enrichment must derive solely from local tax effort" (p. 398).[12] An important and unanswered question is whether local enrichment tax effort will be matched by the state through a power-equalizing formula.[13]

This case continued in the Texas courts into 1991 (*Edgewood v. Kirby*, 1991). In that part of the case, the district court originally found that modifications to the financing statute (Senate Bill 1) did not render the statute constitutional but vacated the Texas Supreme Court's injunction prohibiting financing of schools after a specified date and denied any other injunctive relief or enforcement of that court's mandate. On appeal, the Texas Supreme Court ruled: (a) the trial court had exceeded its authority by vacating the supreme court's injunction, (b) the statute remained unconstitutional for its failure to remedy the major causes of opportunity gaps

[11] The requirement reads as follows: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

[12] The Texas Supreme Court had set May 1, 1990, as the date of enacting the finance system, with implementation beginning by September 1, 1990.

[13] The concept of power equalization (sometimes referred to as wealth equalization) is based on the proposition that local school districts should have equal ability to raise revenue. The decision as to how much money to raise is left to the local district. Under power equalization, the state establishes a schedule of tax rates and guarantees local districts a specified amount per pupil for each level of tax effort.

between rich and poor school districts even though the new statute provided guaranteed revenue per student for each cent of local tax effort over a specified minimum, and (c) the state constitution did not provide a barrier to the general concept of school district tax base consolidations.

The Texas Supreme Court noted that, while significant changes had been made to Senate Bill 1, the bill "leaves essentially intact the same funding system with the same deficiencies [the court] reviewed in *Edgewood I*. . . . [T]he fundamental flaw in Senate Bill 1 lies not in any particular provisions but in its overall failure to restructure the system" (p. 495). The court concluded that "our duty is plain: we must measure the public school finance system by the standard of efficiency ordained by the people in our Constitution . . . . Under that standard, we therefore hold as a matter of law that the public school finance system continues to violate article VII, section 1, of the Constitution" (p. 498). A motion to rehear the cause was later denied.

More recently, the Texas Supreme Court again struck down the state's school finance system, forcing legislators to develop yet another new funding plan (*Carrollton-Farmers Branch v. Edgewood*, 1992). The court's ruling eliminated the county education districts that the Texas legislature had created in 1991 to combine tax bases and distribute funds among the state's school districts. The court responded affirmatively to the arguments that the county districts essentially created a statewide mandatory property-tax rate that violated the state constitution. In order to maximize revenues, however, the court ordered property owners to pay their county education district taxes for 1991 and 1992.[14] The court assigned a June 1993 deadline for the state to complete a new plan to address the funding discrepancies between wealthy and poor school districts within the state. As this was the third time in 28 months that the Texas Supreme Court invalidated the state's system, many observers believe that only a few options remain, such as a massive district-consolidation program or constitutional amendments establishing a statewide property or income tax.

**Kentucky**

In *Rose v. Council for Better Education, Inc.* (1989), the Supreme Court of Kentucky considered "whether the Kentucky General Assembly has complied with its constitutional mandate to 'provide an efficient system of common schools throughout the state'" (p. 189). Plaintiffs alleged that Kentucky's school finance system was inadequate, placed too much emphasis on local resources, and resulted in an inefficient education system in violation of the Kentucky Constitution and the equal protection and due process clauses of the Fourteenth Amendment of the U.S. Constitution. Plaintiffs also argued that the public education system was not "efficient" as mandated by the Kentucky Constitution.

Defendants argued that the court lacked jurisdiction in a matter they characterized as purely "political" and that the alleged constitutional violations were not factually supported. Defendants also claimed an "affirmative

[14] Since the court's decision, a Texas taxpayer has filed suit in federal court seeking to nullify these county education district taxes now, rather than in 1993. See "News in Brief," 1992.

defense," arguing that educational reform laws passed by the Kentucky General Assembly in 1985, along with education budget measures and other laws passed in 1986, adequately corrected the school finance system challenged by the plaintiffs. Denying these claims, the circuit court held that Kentucky's common school finance system was unconstitutional and discriminatory and that the general assembly had failed to establish the constitutionally mandated efficient system of common schools statewide.

On appeal, the Kentucky Supreme Court noted that at one time the state constitution had mandated that school funds appropriated by the general assembly be allocated to school districts according to the number of school-age children in each district, regardless of whether or not they attended school. A 1941 amendment permitted 10% of the state's funds to be used for equalization purposes. A 1944 amendment raised this limit to 25% and, in 1952, per-capita distribution of school funds was eliminated.

The 1952 constitutional amendment was followed by legislative enactment of a Minimum Foundation Program (MFP) designed to "assure substantially equal public school educational opportunities" (*Rose v. Council*, p. 194). To qualify as an MFP participant, a school district was required to levy a minimum property tax of $1.10 per $100 of assessed value (AV) in the district. The maximum rate was set at $1.50 per $100 of AV. Most districts levied the maximum rate because of low assessed property values. Assessments ranged from 33.3% of fair cash value to a low of 12.5%, with a statewide median ratio of 27%.

As a result of the MFP and the diversity of local assessment ratios, a suit was filed challenging the MFP and the problem of built-in disparity in local school tax levies (*Russman v. Luckett*, 1965). The suit resulted in a court order declaring that Section 172 of the Kentucky Constitution required property to be assessed at 100% of fair cash value and ordering the state's revenue board to see that all property was so assessed. However, immediately following this decision, the general assembly passed the "rollback law" that reduced property tax rates proportionate to the assessment increases ordered by the court. As the supreme court noted in *Rose*, this "rollback law" likely exacerbated the inequities the court sought to correct in *Russman* by generally reducing property taxes to their 1965 levels. The law "virtually froze the revenues available to local districts and created the ominous spectacle of different maximum tax rates for the then 180 local school districts in Kentucky" (*Rose v. Council*, p. 195). This action was followed by a 1976 law establishing a "power equalizing program" (PEP) and a 1979 "truth-in-taxation" measure that constrained school district revenue growth.

The net result of this legislation was a negligible increase in school revenue despite rising assessments. The state's contribution arose primarily from the MFP and the PEP. To qualify for MFP assistance, a district was required to operate and pay its teachers for 185 days per school year. Each district's grant was based upon the number of classroom units derived from its average daily attendance through the PEP. Equalization aid was provided to eligible districts for local millage[15] up to a maximum rate set by the

[15] "Millage" is a term used to express a rate of taxation. A "mill" is equal to one-tenth of a cent.

state. In order to receive PEP funds, a local district was required to levy a "minimum equivalent tax rate" of $.25 per $100 of valuation or the maximum rate equalized through PEP, whichever was greater.[16] As noted by the trial court, the mandated underlying tax rate had been so low that only a fraction of the $.25 local tax was actually equalized. These rates were $.09 per $100 in 1985-86, $.10 in 1986-87, and $.13 per $100 thereafter.

Upon reviewing the evidence, the high court concluded that, despite the MFP and the PEP, Kentucky's wide variation in fiscal and educational resources resulted in unequal educational opportunities throughout Kentucky. Noting large interdistrict variances in both per-pupil property wealth and curricula, the court also cited resource-related disparities in pupil achievement test scores and expert opinion presented at trial that clearly established a positive correlation between such test scores and district wealth (*Rose v. Council*, 1989).[17]

The court added that Kentucky's school finance system was ill designed to rectify these inequities due to three basic conditions:

- the absence of a minimum tax effort for local districts;
- the design of the MFP, which allocated state aid according to average daily attendance; and
- the underfunding of the PEP.

The Kentucky case is distinguished from other school finance cases by the breadth of the high court's holding, summarized as follows in the court's words:

> We have decided one legal issue--and one legal issue only--viz, that the General Assembly of the Commonwealth has failed to establish an efficient system of common schools throughout the Commonwealth. Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. This decision applies to the entire sweep of the system--all its parts and parcels. This decision applies to the statutes creating, implementing, and financing the system and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification--the whole gamut of the common school system in Kentucky. (p. 215)

**Montana**

In 1989, the Montana Supreme Court found that the state's 1985-86 public school finance system violated the constitu-

[16] The "minimum equivalent tax rate" was defined as the quotient derived from dividing the districts' previous years' income from tax levies by the total assessed property valuation plus the assessment for motor vehicles.

[17] Further, in a somewhat unusual turn, the court compared Kentucky's elementary and secondary education system with national and neighboring norms in terms of fiscal and outcome measures, finding Kentucky substandard in both instances.

tional guarantee of equal educational opportunity (*Helena Elementary School District No. 1 v. State of Montana*, 1989). The suit presented evidence of per-pupil spending disparities as high as 8:1 among districts of similar size, owing largely to disparities in taxable property wealth. Further, plaintiffs presented testimony indicating a direct correlation between per-pupil spending levels and curriculum breadth and quality, the availability of educational materials, and the quality of school buildings and facilities. Plaintiffs also provided testimony indicating that (a) the availability of funds clearly affects the extent and quality of the educational opportunities, (b) there is a positive correlation between the level of school funding and the level of educational opportunity, and (c) the better funded districts have a greater flexibility in the reallocation of resources.

Montana's 554 fiscally independent districts raise revenue from local property taxes. A simple majority of voters must approve budget or tax increases. These local levies are optional and supplement a statewide property tax that funds the basic support program. The basic statewide levy is 28 mills for elementary school districts and 17 mills for high school districts. County levies are required for pupil transportation. In 1986-87, the state provided an estimated 53% of state and local K-12 revenue. Annual legislative appropriations include state general fund revenues and the following earmarked state revenues: (a) 25% of income taxes; (b) 25% of corporation license taxes; (c) 10% of severance taxes on coal; and (d) 66.5% of the state's share of federal oil and gas royalties, interest, and income from the public school fund, and the education trust fund.

Basic state support is distributed by means of a foundation formula. The foundation funding level is based on an average pupil count (average number of pupils belonging, or ANB), which is comparable to average daily membership. However, local districts may exceed their foundation spending level by up to 25%. Fully 99% of Montana's school districts participate in the enrichment or "permissive" levy. The local share of "enrichment spending" is the revenue from a six-mill levy in an elementary school district or a four-mill levy in a high school district. These local obligations are reduced proportionally when enrichment spending is less than 25% of the foundation level.[18] These local enrichment levies are power equalized and subject to recapture.

The district court had earlier concluded that education is a fundamental right under Montana's constitution and that the property-wealth-related spending disparities fail the rational basis test of equal protection analysis. The court rejected both local control and the state's overall budget constraint as legal justifications for school spending inequalities. The court ordered that the current school finance system could remain in effect until October 1, 1989, and charged the legislature with fashioning a remedy.

On appeal, the Montana Supreme Court cast the issue as "Does Montana's system of funding the public schools violate the Education Article, Article X, of the Montana Constitution?" (*Helena v. State*, 1989, p. 689). The relevant subsections of the Montana

[18] The actual enrichment levy may be reduced when federal impact aid and other revenues are available to the school district.

Constitution (1889) provide:

> • It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of opportunity is guaranteed to each person of the state.
>
> • The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

The state offered two arguments in its defense. First, it asserted that the guarantee of equal educational opportunity was merely an "aspirational goal." Second, the state argued that its foundation formula distributed funds equitably, thereby satisfying the constitutional obligation.

The court rejected both claims, relying in each instance on the "plain meaning" of the education article. The court concluded that each Montana citizen is guaranteed equal educational opportunity. Further, the high court found that the trial evidence "clearly and unequivocally" established large interdistrict disparities in per-pupil spending not related to "educationally relevant factors," which constituted unequal educational opportunity (p. 690). The court also rejected the state's argument that the interdistrict spending disparities were justified by the constitutional provision for local control of the public schools, finding that the disparities were an effective barrier to such control in low-spending districts. As is generally the case in school finance litigation, the court left to the legislature the task of fashioning a constitutional remedy.[19]

### III. Summary and Conclusion

Beginning with *McInnis v. Shapiro* in 1968, courts in over 30 states have considered challenges to their K-12 public school finance systems. In each case, plaintiffs have contended that the finance system violated either the equal protection clause of the state or federal constitution, the education article of the state constitution, state statutes, or some combination of these requirements.

This history of litigation demonstrates a continuing impatience with the political process as a means of change. Further, until the latest round of litigation involving New Jersey, Texas, Montana, and Kentucky, virtually all cases were brought on equity

[19] Two additional issues were raised in this case. First, the state attempted to argue that equality of educational opportunity is more appropriately measured in terms of academic outcomes, not expenditures, and that the spending disparities presented at trial should be excused in light of Montana's fiscal difficulties of recent years. The court rejected these arguments, citing a lack of evidence supporting the "outcomes theory" of educational opportunity and the principle that the state's fiscal difficulties "in no way justify perpetuating inequities." Second, the court rejected the state's claim that recently promulgated accreditation standards for elementary and secondary school assured a quality education for all.

grounds.[20] That is, plaintiffs have claimed that relying on a property tax base unequally distributed across local school districts results in unequal educational opportunity for children. Examination of the state court decisions in these cases reveals a similarity of language in the state education clauses. The difference between cases in which systems are upheld and those in which systems are overturned lies in the courts' application of the equal protection clause to the education clause.

In cases affirming the constitutionality of school finance systems, courts have generally found education not to be a fundamental right. In the absence of such constitutional status, the courts have adopted a rational basis analysis when applying a state's equal protection clause. By this analysis, the court extends to the law a presumption of constitutionality and requires only that the finance system be reasonably related to a legitimate state interest or purpose. In these cases, courts have generally upheld finance systems, relying heavily on local property wealth as rationally and reasonably related to a state interest in maintaining local control of K-12 public education.

In those cases where school finance systems have been overturned, state courts have interpreted the language or intent of the constitution's education article as according education the status of a fundamental right subject to equal protection guarantees. In such cases decided prior to 1989, state courts applied the more rigorous strict scrutiny test reserved for legislative classifications that are based on a suspect classification or that impinge on a fundamental right. Under this test, the legislation loses its presumption of constitutionality and the government must demonstrate that its school finance system is justified by a compelling state interest. Thus, the state bears the burden of demonstrating that a fiscally inequitable finance system is constitutional due to a compelling state interest in retaining such a system. By that standard, the finance systems in question were found to be indefensible.

In contrast, the supreme courts of Montana, Kentucky, and Texas examined only the education articles of their respective constitutions in overturning their school finance systems, bypassing altogether the equal protection analysis. In each case, the state's high court found that the education article established education as a fundamental right and supported plaintiffs' claims that the finance systems were unconstitutional. In Montana, fiscal inequities across local districts were found to violate a fundamental right, while the Texas Supreme Court overturned that state's system on the basis of "inefficient funding." The Kentucky ruling, while arising from a school finance challenge, overturned the entire education system, not merely the "inadequate" funding system.

As a result of the most recent cases, the concepts of "adequacy" and "efficiency" have been added to "equity" as standards to which a state school finance system may be held if its education clause is so worded. The expansive interpretation of the education article as well as the level of scrutiny applied in an equal protection claim are key determinants of judicial outcomes. Further, while courts

[20] "Equity" is defined as "justice administered according to fairness as contrasted with the strictly formulated rules of common law." *Black's Law Dictionary*, p. 540.

have generally been reluctant to impose specific remedies, the following features of school finance systems have been found to be inequitable in school finance litigation: (a) unmatched local enrichment funds, (b) flat grants or minimum state aid guarantees paid to all school districts regardless of wealth or spending levels, (c) foundation funding levels that are substantially lower than actual spending levels, and (d) "hold harmless" provisions that perpetuate historical funding inequitiess.[21]

Finally, examination of school finance litigation since 1970 reveals a problematic degree of variation in judicial findings across states in the face of similar fiscal situations. A basic and consistent sense of fairness seems to be absent from our overall view of public education. Further, the failure of our political system to achieve consensus on the questions of equity, adequacy, and efficiency in public education is worrisome. Litigation is now pending in several states.[22] In these cases, as in those discussed above, the fairness of the state school finance system in distributing education resources is called into question. "Fairness," however, eludes legal definition, and the holding in each case will inevitably turn on the individual court's interpretation of state constitutional language. In the absence of clearly stated moral principles upon which to make such holdings, the future of public school finance in these and other states is destined to remain uncertain.

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[21] State categorical aid distributed without regard to variances in local district wealth has also been found unconstitutional by the courts. One possible remedy has been instituted by Michigan, whose "categorical recapture" provision deducts from the categorical aid of property-rich districts an amount equal to the district's local revenue that exceeds the tax base guarantee level of the state's general aid formula. This provision was substantially strengthened in fiscal year 1990-91, when state social security payments to local districts were made subject to recapture as well.

[22] See note 1 for a list of these states.

## References


Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (N.J. 1990).

Black, H. C. (1990). *Black's law dictionary* (6th ed.). St. Paul: West Publishing.

Blase v. State, 55 Ill. 2d 94, 302 N.E.2d 46 (Ill. 1973).

Board of Education of Township of Fairfield v. Kean, 188 N.J. Super. 244, 457 A.2d 59 (N.J. Super. Ct. 1982).

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District, 1992 WL 16255 (Tex.).

Craig v. Boren, 429 U.S. 190 (1976).

Dupree v. Alma School District No. 30, 279 Ark. 340, 651 S.W.2d 90 (Ark. 1983).

Edgewood Independent School District v. Kirby, Cause No. 362 (250th Dist. Ct., Travis County, Tex. 1987).

Edgewood Independent School District v. Kirby (Edgewood I), 777 S.W.2d 391 (Tex. 1989).

Edgewood Independent School District v. Kirby (Edgewood II), 804 S.W.2d 491 (Tex. 1991), *rehearing overruled*, Feb. 27, 1991.

*Georgia Constitution*, Article VIII, §1, para. 1 (1976).

Hanushek, E. A. (1989). The impact of differential expenditures on school performance. *Educational Researcher, 18*(4), 45-51, 62.

Helena Elementary School District No. 1 v. State of Montana, 236 Mont. 44, 769 P.2d 684 (Mont. 1989).

Horton v. Meskill (Horton I), 172 Conn. 615, 376 A.2d 359 (Conn. 1977).

Horton v. Meskill (Horton II), 195 Conn. 24, 486 A.2d 1099 (Conn. 1985).

Kirby v. Edgewood Independent School District, 761 S.W.2d 859 (Tex. Ct. App. 1988).

Lujan v. Colorado State Board of Education, 649 P.2d 1005 (Colo. 1982).

McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (Ga. 1981).

McInnis v. Shapiro, 293 F. Supp. 327 (N.D.Ill. 1968), *aff'd.* 394 U.S. 322 (1969).

*Montana Constitution*, Article X, § 1 (1889).

*New Jersey Constitution*, Article VIII, § 4 (1947).

News in brief. (1992, February 19). *Education Week*, p. 25.

Olsen v. State, 276 Or. 9, 554 P.2d 139 (Or. 1976).

Pauley v. Gainer, 177 W. Va. 464, 353 S.E.2d 318 (W. Va. 1986).

Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (W. Va. 1979).

Plyler v. Doe, 457 U.S. 202 (1982).

Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (N.J. 1973).

Rodriguez v. San Antonio Independent School District, 337 F.Supp. 280 (D.Tex. 1971), *rev'd.* 411 U.S. 1 (1973).

Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989).

Russman v. Luckett, 391 S.W.2d 694 (Ky. Ct. App. 1965).

Sparkman, W. (1990). School finance challenges in state courts. In J. K. Underwood & D. A. Verstege (Eds.), *The impacts of litigation in public school finance* (pp. 193-224). New York: Ballanger.

*Texas Constitution*, Article VII, § 1 (1870).

Thompson v. Engelking, 96 Idaho 793, 547 P.2d 635 (Idaho 1975).

Walker, B. D., & Thompson, J. D. (1989). Special report: Edgewood Independent School District v. Kirby. *Journal of Education Finance, 14*, 426-434.

Webb, L. D., McCarthy, M. M., & Thomas, S. B. (1988). *Financing elementary and secondary education.* Columbus, OH: Merrill Publication Co.

*West Virginia Constitution*, Article XII, § 1 (1870).

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